No. 21-1411

ORIGINAL

In The

Supreme Court of the United States

EMANUEL MCCRAY, et al.,

Petitioners,

v.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Pro Se

QUESTIONS PRESENTED

1. What is the appropriate constitutional authority embodied in Articles I and III and the Tenth and Thirteenth Amendments of the U.S. Constitution that permits the President and the administrative agencies of the United States, under Article II of the U.S. Constitution, to exercise or extinguish power under the guise of legislative authority contained in the Public Health Service Act of 1944 ("PHSA"), Pub. L. 78-410, 58 Stat. 682, Chapter 373 (42 U.S.C. ch. 6A § 201 et seq.) and the Occupational Safety and Health Act of 1970 ("OSH Act"), Pub. L. 91-596, §6, Dec. 29, 1970, 84 Stat. 1593 [29 U.S.C. §655(c)]?

2. What is the proper remedy and redress when an administrative agency exercises power contrary to the Federal Constitution's separation of powers?

3. What is the appropriate constitutional, congressional, statutory and or judicial authority governing the issues of "timeliness", "mootness" and the terms "*sua sponte*" and "*nostra sponte*" given Respondent's exercise of power contrary to the Federal Constitution?

PARTIES TO THE PROCEEDING

Petitioners were the petitioners in the court of appeals. Respondent OHSA was the respondent in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioners make the following disclosures:

Petitioner Emanuel McCray is the sole Director of God Loves You, Inc., a nonprofit corporation organized under the laws of the State of Washington. No publicly traded company or corporation is a parent or own 10% or more of its stock or has an interest in the outcome of this case.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Supreme Court of the United States:

Nat. Federation of Independent Business v. OSHA, Nos. 21A244 and 21A247, 142 S.Ct. 661 (2022) (Per Curiam) (opinion granting applications for stays).

United States Court of Appeals (6th Cir.):

In Re: MCP No. 165, Occupational Safety and Health Administration Rule On Covid-19 Vaccine and Testing, 86 Fed. Reg. 61402, Case Nos.

RELATED PROCEEDINGS—Continued

21-7000/21-4027/21-4028/21-4031/21-4032/21-4033/21-4080/21-4082/21-4083/21-4084/21-4085/21-4086/21-4087/21-4088/21-4089/21-4090/21-4091/21-4092/21-4093/21-4094/21-4095/21-4096/21-4097/21-4099/21-4100/21-4101/21-4102/21-4103/21-4108/21-4112/21-4114/21-4115/21-4117/21-4133/21-4149/21-4152/21-4157, MCP No.165, OSHA Covid Rule Originating Case No.: OSHA-2001-0007 (February 18, 2022) (order dismissing petitions for review as moot).

Emanuel McCray, et al. v. OSHA, Case No. 22-3009, Originating Case No.: 2021-0007 (March 4, 2022) (order dismissing related petition as untimely or in the alternative moot).

Emanuel McCray, et al. v. OSHA, Case No. 22-3009, Originating Case No.: 2021-0007 (March 24, 2022) (order denying motion for rehearing).

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The court of appeals order (App. 1-2) is unpublished. The court of appeals order (App. 3-4) is unpublished. The court of appeals order (App. 5-7) is unpublished.

JURISDICTION

The court of appeals entered its final order in Originating Case No. OSHA-2001-0007 on February 18, 2022. No mandate issued. The court of appeals entered its original order in this related Case No. 22-3009 to Originating Case No. 2021-0007 on March 4, 2022. No mandate issued. The court of appeals entered its final order in this related Case No. 22-3009 to Originating Case No. 2021-0007 on March 24, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1). No mandate issued.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 to the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, Section 1, Clause 1 to the United States Constitution provides:

> "The executive Power shall be vested in a President of the United States of America."

Article III, Section 1 to the United States Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Thirteenth Amendment, Section 1 to the United States Constitution provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall

exist within the United States, or any place subject to their jurisdiction."

STATEMENT

This Petition picks up from where Petition Nos. 21A244 and 21A247 and *National Fed'n of Indep. Bus. v. Department of Labor*, 142 S. Ct. 661 (2022) left off; is related to those previous proceedings; and presents only additional facts necessary to support this Petition.

This Petition also presents varied and complex recurring issues of core constitutional concern involving the constitutionality of the use of legislative and judicial powers by the President and the administrative agencies during an emergency situation adversely addressed by the Court in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

On January 5, 2022, Petitioners sought judicial review in the Sixth Circuit Court of Appeals "pursuant to our individual power reserved in the Tenth Amendment, and our power as a group acting as a class pursuant to 29 U.S. Code § 655(f), 29 U.S. Code § 652(4),[1] *Bond v. U.S.*, 564 U.S. 211, 131 S. Ct. 2355 (2011), *Bond v. United States*, 572 U.S. 844, 134 S. Ct. 2077 (2014),[2]

[1] "The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons."

[2] Holding that: "'An individual may assert injury from governmental action taken in excess of the authority that federalism defines.'"

Califano v. Yamasaki, 442 U.S. 682, 700, 99 S. Ct. 2545 (1979),[3] and the fact that the [ETS] operates nationwide. . . ."

On January 6, 2022, Respondent was directed by "Leon T. Korotko", a Case Manager for the Sixth Circuit, to file an "Appearance of Counsel" "by January 20, 2022". Respondent did not file an appearance until February 23, 2022—over 30 days past the due date.

Petitioners' Petition for Review alleged Respondent's Emergency Temporary Standard ("ETS") was driven by a "mere force of numbers conspiracy" that included a legal crime proscribed under 18 U.S. Code §1038 as the object of the conspiracy and a civil cause of action for violating the criminal statute.

On January 13, 2022, the Supreme Court stayed enforcement of Respondent's ETS:

> "[P]ending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought. Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari

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[3] Holding that "class relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized. . . . Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them."

> are granted, the order shall terminate upon the sending down of the judgment of this Court." *National Fed'n of Indep. Bus.*, 142 S. Ct. at 666-667.

On the same day the Court released its Decision, Martin Joseph Walsh ("Walsh"), Secretary of the U. S. Department of Labor, brazenly stated, among other things:

> "OSHA promulgated the ETS under clear authority established by Congress. . . . OSHA will do everything in its existing authority to hold businesses accountable for protecting workers. . . ." Available from https://www.dol.gov/newsroom/releases/osec/osec20220113 (*Statement from Secretary of Labor Marty Walsh on Supreme Court ruling on OSHA emergency temporary standard on vaccination, testing*, January 13, 2022).

On January 25, 2022, Respondent filed a motion to dismiss as "moot", all Petitions given the fact that Respondent was withdrawing the ETS effective on January 26, 2022.

Remarkably, Respondent's motion made no mention of the petition filed by Petitioners on January 5, 2022 and duly served upon Respondent's Counsel.

In Exhibit A attached to Respondent's Motion to Dismiss, notwithstanding the "withdrawal" language Respondent used in the body of its Motion, Attorney Douglas L. Parker ("Parker"), Assistant Secretary of

Labor for Occupational Safety and Health ("OSH"), in relevant part, stated that:

> "OSHA is not withdrawing the ETS to the extent that it serves as a proposed rule under section 6(c)(3) of the Act, and this action does not affect the ETS's status as a proposal under section 6(b) of the Act or otherwise affect the status of the notice-and-comment rulemaking commenced by the . . . ETS." See Respondents' Motion To Dismiss The Petitions As Moot, Sixth Circuit Case No: 21-7000, Doc. No. 408 at 8, filed January 25, 2022.

On March 4, 2022, the Sixth Circuit, acting *nostra sponte* and citing 29 U.S.C. § 660 and Respondent's withdrawal of the ETS on January 26, 2022 (87 Fed. Reg. 3928), dismissed Petitioners' Petition for Review on the grounds that:

> "McCray's petition for review was due on or before January 4, 2022, but was filed two days late. Even if the petition for review was timely, it is now moot." Appendix (App.) A.

On March 6, 2022, a timely motion for rehearing assigning error to the issues of timeliness and mootness was filed. Once again, the Sixth Circuit failed to obtain assistance from Respondent, but agreed with Petitioners the Court "referred to the wrong statute when considering the timeliness of his petition for review."

Notwithstanding the admission of error as to its timeliness ruling and the increased risk of creating a

constitutional question for this Court, the Sixth Circuit, without citing any authorities, other than 29 U.S.C. § 655(f), ruled: "The petition for review was correctly dismissed as untimely." The Sixth Circuit did not address as error the issue of "mootness". App. B.

The Sixth Circuit's timeliness calculation under 29 U.S.C. § 655(f), from and including Friday, November 5, 2021, and to and including Tuesday, January 4, 2022, results in a total of 61 days which is contrary to the statutory 59 days allowed by Congress.

Petitioners found no other calculation of timeliness under 29 U.S.C. § 655(f) from the Circuit Courts. The issue of timeliness is a matter of first impression by the Federal judiciary. The statute, in pertinent part states:

> "Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard. . . ." 29 U.S.C. § 655(f).

The Sixth Circuit's *sua sponte/nostra sponte* dismissal of Petitioners' Petition for Review violates the "principle of party presentation"—a core tenet of the American adversarial system. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). See also *Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008).

The possibility that the federal government may change its mind, find other ways to further the 18

U.S.C. § 1038 international conspiracy set forth in the Petition for Review, or find ways to overcome or avoid the constitutional difficulties, problems and issues revealed by the Court in *National Fed'n of Indep. Bus. v. Department of Labor*, 142 S. Ct. 661 (2022), precluded a finding of moot by the Sixth Circuit. See *United States v. Generix Drug Corp.*, 460 U.S. 453, 457 n.6 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness.")

In *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), an antitrust case, the Court held that:

> "Voluntary cessation of allegedly illegal conduct . . . does not make the case moot. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. (Citation omitted.) The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement."

See also *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952), requiring "clear proof" of abandonment, "especially when abandonment seems timed to anticipate suit, and there is probability of resumption"; *J.I. Case Co. v. Labor Board*, 321 U.S. 332, 334 (1944) (examining the merits after finding the case was not rendered moot "[i]n view of the continuing character of the obligation imposed by the order."); and *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298 (2012):

> ("After certiorari was granted, however, the union sent out a notice offering a full refund to all class members, and the union then promptly moved for dismissal of the case on the ground of mootness. Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. (Citation omitted.) The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.") Id. 567 U.S. 298 at 307.

In *Church of Scientology v. United States*, 506 U.S. 9 (1992), a case relied upon by the Sixth Circuit to conclude that this litigation was rendered moot by the Government's "withdrawal" of the ETS, the Court rejected the notion that simple withdrawal or "compliance" following an unlawful invasion of constitutional of rights automatically renders an appeal "moot", given the fact that "a court can fashion some form of meaningful relief in circumstances such as these. . . ." *Id.*, 506 U.S. at 12, 15, 17-18, n.11.

See also *Florida Public Interest Research Group Citizen Lobby, Inc. v. Environmental Protection Agency*, 386 F.3d 1070, 1086 (11th Cir. 2004):

> "The doctrine of mootness derives directly from [Article III's] case-or-controversy limitation because an action that is moot cannot be characterized as an active case or controversy. . . . [B]ecause mootness is jurisdictional, dismissal is mandated."

Moreover, Respondent's feigned voluntary withdrawal of the unlawful ETS is closely connected with this Court's non-mootness doctrine and the Court's conspiracy law. See *Smith v. United States*, 568 U.S. 106 (2013):

> "Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense. Withdrawal achieves more modest ends than exoneration. Since conspiracy is a continuing offense, (citation omitted) a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence,' (citation omitted, brackets by the court) and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot, (citation omitted). Withdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators, but he remains guilty of conspiracy . . . even if he is entirely *inactive* after joining it." *Id.*, 568 U.S. at 110-11, 114. (Emphasis in the original.)

The "continuing offense" nature of a conspiracy means Respondent and its agents "continue[] to violate the law" and as such, this fact was sufficient to preclude a finding of mootness by the Sixth Circuit Court of Appeals. See *United States v. Lebedev*, 932 F.3d 40, 51 (2d Cir. 2019) ("That members of a conspiracy have had a disagreement or a falling out is not, however, sufficient to establish withdrawal from the conspiracy."); *United States v. Gaye*, 902 F.3d 780, 795 (8th Cir. 2018) (inactivity not enough); *United States v.*

Sitzmann, 893 F.3d 811, 824 (D.C. Cir. 2018) ("[A]rrest, without more, does not indicate withdrawal"); *Hyde v. United States*, 225 U.S. 347, 369-70 (1912) ("Until he does withdraw there is conscious offending.")

REASONS FOR GRANTING THE WRIT

This Petition is necessary to settle several extremely important questions of public health law; to correct the Sixth Circuit; and to decisively righten the unconstitutional waywardness of elected and unelected agents of the United States and their coconspirators in the domestic private sector and the foreign global community in their efforts to unlawfully maintain and extinguish Power by way of a global conspiracy.

President Biden and the administrative agencies of the United States, together with diverse others, are engaged in 1) the making of U.S. laws; 2) the judicial interpretation of the laws they are making; and 3) the enforcement of the unconstitutional laws they have enacted as a "work-around" to the U.S. Constitution.

In this light, President Biden and his administrative agencies and others, each by their own individual conduct, are at war with the People of the United States, Congress and the Supreme Court of the United States.

Notwithstanding the fact that Congress has not provided authority to propose a rule mandating

"unvaccinated employees" be vaccinated, Respondent has boldly stated: "OSHA is not withdrawing the ETS".

The Secretary of Labor, too, has rejected the supremacy of the Supreme Court of the United States by stating: "OSHA promulgated the ETS under clear authority established by Congress".

These administrative agency positions run against a key holding in *Bond v. United States*, 572 U.S. 844 (2014): "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Id.* 572 U.S. at 854.

Humans, wherever they reside in the United States, are no longer the properties or commodities of the Crown, Governments, employers, businesses, and individuals. Section 1 of the Thirteenth Amendment made this fact clear when "chattel slavery" and "involuntary servitude" were abolished "within the United States, or any place subject to their jurisdiction."

Contrary to the constitutional logic of the Thirteenth Amendment, the Secretary of Labor and Respondent remain hell-bent on finding ways to unconstitutionally compel employers to vaccinate employees the employers do not and cannot ever own and without the informed consent of the employee.

The unrelenting and fallacious insistence by Respondent and the international conspirators that the ETS is necessary "to protect unvaccinated employees of large employers", 86 Fed. Reg. 61,402 and 87 Fed. Reg. 3928, is dangerously at odds with the Fifth and

Tenth Amendments, the "principles of federalism" and the guarantee of "freedom" and "liberty" of the individual from arbitrary power recognized in *Bond v. U.S.*, 564 U.S. 211, 221-22 (2011).

By their demonstrated conduct, Respondent and its human agents and their coconspirators further reject the idea that "[a]dministrative agencies are creatures of statute" and "possess only the authority that Congress has provided." *National Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

These circumstances are very much extraordinary. Agents representing the United States are directing employers to inflict death or other potentially injurious harms upon their "unvaccinated employees" without first obtaining the individual's informed consent, and or without any medical proof the individual's immune system ***is not*** working according to its natural design.

As an extra circumstance, the Sixth Circuit's *sua sponte/nostra sponte* dismissal of Petitioners' Petition for Review violates a "core tenet" of our adversarial system.

The Court must settle the appearance of unconstitutional waywardness by exercising the Court's greatest power, that of judicial review. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803):

> "This is of the very essence of judicial duty. . . .
> "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law

> repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* 5 U.S. at 178, 180.

The questions presented threaten the vitality of our Nation, notwithstanding *Youngstown Co. v. Sawyer*, *supra*. The conduct of Respondent and others in response to the Court's decision demonstrates the threat of repetition. The determination of the constitutional validity of the Respondent's ETS is ripe. The questions are exceptionally important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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